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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL., ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered June 12, 1941 (application

for extension of time for petitioning for writ of certiorari having been granted by a Justice of this Court to and including October 13, 1941).

It is noteworthy that in this case three opinions have been written by the Illinois Supreme Court, the final opinion by a divided court, two justices writing dissenting opinions. Also, the final opinion of the court reaches a conclusion directly opposite to that of the Supreme Court of Oklahoma in two recent opinions dealing with the same subject.

Opinion Below.

The opinion of the Supreme Court of Illinois entered June 12, 1941, upon denial of petitioners' petition for a rehearing, modifies a previous opinion entered April 15, 1941, reverses a former opinion of the same Court in favor of petitioners entered December 16, 1940, and affirms an opinion of the Appellate Court of Illinois, Second District, entered February 17, 1940. The chief justice and one associate justice wrote dissenting opinions, the chief justice stating that in his view of the case petitioners had been deprived of their rights without due process of law. Issuance of mandate was stayed by order of the chief justice of the Supreme Court of Illinois in vacation entered June 26, 1941, pending final disposition of this case in the Supreme Court of the United States.

Summary Statement.

The Peoria Life Insurance Company (hereinafter called the "Peoria Life") was an insurance company with its main office at Peoria, Illinois.

On November 15, 1933, upon the petition of Ernest Palmer, Director of Insurance of the State of Illinois, the Circuit Court of Peoria County, Illinois, found that the capital stock of the Peoria Life was impaired. Respondent, Charles V. O'Hern, was appointed receiver.

Subsequently, on June 22, 1941, Respondent Timothy W. Swain was appointed successor receiver.

This action arises out of seven claims filed in apt time against the receiver by petitioners, former agents of the Peoria Life, or, in two cases, their assignees. Since the two assignees stand in all respects in the shoes of their assignors they will not hereinafter be differentiated. The agents had contracts with the Peoria Life, by the terms of which they were to be paid, as part or all of their compensation, renewal commissions for a period of years on insurance business written by them. Some of the petitioners were general agents whose sole compensation consisted of commissions on renewals. Prior to the date of receivership all but two of the agents had already retired, and their contracts were terminated as to future activity, with the agreement, nevertheless, that they would continue to receive renewal commissions for the length of time and in the amount set forth in their contracts, as compensation for services already fully performed. Under all the contracts commissions on renewals were paid solely for the agent's original work in securing the policies, and no part of the renewal commissions was compensation for servicing the business or keeping it in force.

Subsequent to the appointment of the receiver, the Circuit Court of Peoria County entertained proposals for the reinsurance of the business of the Peoria Life. The successful contender was Life and Casualty Company of Chicago (name subsequently changed to Alliance Life Insurance Company; hereinafter called "Alliance Life"). By amendment to petitioners' original claims and by a general voluntary appearance the Alliance Life became a party defendant and is now a respondent to this proceeding.

The decree approving the Reinsurance Agreement between the Receiver and the Alliance Life was entered August 22, 1934, prior to the filing of petitioners' claims, and, as the Circuit Court expressly found, without any

notice whatsoever to petitioners. Section 4(e) of this decree provided that the contracts of former agents of the Peoria Life, including those of petitioners, were "disaffirmed" as of the date of receivership, November 15, 1933. By the judgment of the Supreme Court of Illinois this decree is interpreted to mean that the agents' contracts are disaffirmed, not only as to their right to act as agents in the future, but also as to commission interests theretofore acquired. By Section 37 of the Reinsurance Agreement, which was approved by said decree, the Alliance Life repudiated any obligation to former agents, including petitioners, under their contracts with the Peoria Life.

Sections 31 and 32 of the Reinsurance Agreement established a Peoria Life Fund, to be managed by the Alliance Life and to include all income and disbursements with respect to the Peoria Life business reinsured. It was provided that said fund was to be segregated and remain separate from the assets of the Alliance Life for a period of years beyond the time for which renewals are claimed by petitioners.

There was never any sale of the assets of the Peoria Life and distribution of the proceeds to creditors. The Alliance Life paid nothing and is not obligated to pay anything for the business of the Peoria Life, and, under the terms of the Reinsurance Agreement, it is protected against loss by a fifty per cent lien against the policies of the Peoria Life and by a schedule of fees and charges which it is permitted to make against the Peoria Life Fund for managing the business reinsured. The appreciation in value of the Peoria Life assets since 1933 will also ultimately inure to the benefit of the Alliance Life.

All policy holders of the Peoria Life who did not expressly dissent from the Reinsurance Agreement were assumed to assent to its terms. The assenting policy holders were in the great majority, and each was issued a cer

tificate of assumption by the Alliance Life. Said policy holders have retained their original policies and have continued to pay to the Alliance Life as premiums thereon the amount called for by said policies (less a slight deduction therefrom by reason of elimination of an accident and health clause not material here). Said premiums still include the amount originally figured in as "loading" to pay the renewal commissions sought to be recovered in this litigation. The Alliance Life admits that it is paying the amount of these renewal commissions on the Peoria Life business to someone other than Petitioners and sometimes to agents of its own who had no part in selling the policies and who in some instances have performed no service whatsoever in return therefor.

Throughout this litigation in the courts of Illinois, petitioners' prayer has been for an accounting of renewal commissions on premiums paid by policy holders either to the Receiver or the Alliance Life on insurance policies written by petitioners; and, as against the Receiver, in the alternative for damages in compensation for services performed before receivership.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 237(b) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A. Title 28, § 344). From the beginning of this litigation petitioners have preserved the constitutional question of due process of law, and they here continue to contend that, by the final judgment of the Supreme Court of Illinois, the highest court of that state, they are deprived of property rights without due process of law, contrary to Article XIV of the Amendments to the Constitution of the United States.

The Questions Presented.

The only fundamental question presented is whether petitioners by the judgment of the Supreme Court of Illinois have been deprived of property rights without due process of law contrary to Article XIV of the Amendments to the Constitution of the United States. This question takes the following aspects:

(1) Whether petitioners can be deprived of a property interest and their rights concluded by a reinsurance agreement, to which they were not parties, approved by a decree of the Circuit Court, Peoria County, Illinois, entered at a hearing at which they were not present and of which they had no notice whatsoever and from which they had no right of appeal or other redress, although they were parties in interest.

(2) Whether, independent of the Circuit Court of Peoria County and irrespective of its intent in "disaffirming" petitioners' contracts as of the date of receivership, petitioners have not been deprived of property rights without due process of law by the interpretation subsequently given the decree of the Circuit Court by the Appellate and Supreme Courts of Illinois, to-wit: that said decree destroyed rights already fully acquired and vested.

(3) Whether petitioners have vested property rights in insurance business which they wrote for the Peoria Life under contracts wholly executed by them and executory only as to payment to them of renewal commissions.

(4) Whether, considering that said policies have been "* * * revived and renewed * * *" by a court decree and "* * * reinsured and assummed * * *" by the Alliance Life under its reinsurance agreement and that payment of premiums has continued to be made either to the Receiver or to the Alliance Life, petitioners have a continuing right to receive their renewal commissions as premiums are paid.

(5) Whether petitioners have a property right in the nature of an equitable lien ataching to premium payments in the amount of their renewal commissions of which they have been deprived without due process of law.

(6) Whether petitioners have property rights as beneficiaries of a trust created when respondents received premiums on policies in which petitioners had a renewal commission interest of which they have been deprived without due process of law.

(7) Whether petitioners have been deprived of their property without due process by reason of being denied a cause of action for damages for the anticipatory breach of a contract fully performed by them.

(8) Whether the receivership of the Peoria Life could terminate petitioners' contracts in the sense of destroying rights wholly accrued, when the policies written by petitioners have been continued in force and premiums thereon paid, first to the Receiver and then to the Alliance Life, no further service remaining to be done by petitioners.

(9) Whether petitioners, who have been denied all renewal commissions on premiums paid subsequent to the date of receivership, have been inequitably discriminated against as compared with other creditors of the Peoria Life, they being the only creditors who have been denied recovery on their claims both as against the Receiver and the reinsuring company.

(10) Whether the Alliance Life, which reinsured the business of the Peoria Life, should in equity be permitted to divert to its own uses the renewal commission interest of petitioners, thereby becoming unjustly enriched at petitioners' expense.

(11) Whether an insurance company (the Alliance Life) reinsuring the policies of another company in receivership (the Peoria Life) may in equity be permitted to receive all

the premium income and other benefits of the business reinsured without any expense to it and assume none of the burdens, such as payment of renewal commissions, incident thereto.

(12) Whether it is not a material consideration that petitioners' contracts expressly provided (1) that suspension of business by the Peoria Life should not affect commissions previously acquired, and (2) that five of the petitioners were no longer in the employ of the Peoria Life at the date of the receivership, but were nevertheless being paid their renewal commissions on business previously written; both of which factors were ignored by the opinion of the Illinois Supreme Court.

(13) Whether the receivership of the Peoria Life was a liquidation in such a sense as to reduce petitioners to the position of creditors, or whether said receivership was not ultimately transformed into a rehabilitation proceeding which left petitioners' vested interests unaffected.

Reasons Relied on for Allowance of the Writ.

(1) The Supreme Court of Illinois in its opinion in this case has departed from fundamental principles of law long recognized by this Court and has thereby deprived petitioners of their rights without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, petitioners being without remedy other than to petition this Court for a writ of certiorari.

(2) In particular, the judgment of the Supreme Court of Illinois deprives petitioners of vested property rights without due process of law, to-wit: without any notice or opportunity to be heard, or opportunity of appeal or other redress.

(3) The Supreme Court of Illinois in its majority opinion ignores the vital constitutional issues raised by this

case; whereas the Chief Justice of that Court in his dissenting opinion says, in part:

> "The view of the majority seems to support the proposition that the termination of the appellants' rights to act as agents has terminated all of the rights they have accrued under such contracts. To this I cannot accede, as I believe to so hold would authorize the taking of property without due process of law in the class of cases above specified."

(4) This case involves not only substantial amounts of money as it affects the parties hereto, but also substantial questions of law affecting life insurance companies and their agents everywhere, in a field in which there are comparatively few decisions and the courts are in disagreement.

(5) The Supreme Court of Illinois, after stating in its opinion that this case raises the question of petitioners' rights against the Receiver of the Company reinsured, wholly failed to adjudicate such rights.

(6) The judgment of the Supreme Court of the State of Illinois did not treat petitioners on an equality with other creditors of the Peoria Life, thereby depriving petitioners of their property without due process of law, contrary to Article XIV of the Amendments to the Constitution of the United States.

(7) There was never any liquidation of the Peoria Life in the sense of a sale of assets and pro rata distribution to creditors, but instead the Alliance Life by paragraph 2 of the Reinsurance Agreement undertook to "reinsure and assume" the Peoria Life business as of the date the receiver was appointed, and the Circuit Court in its decree approving that agreement found that the policies of the Peoria Life "are hereby revived and renewed"; and yet the reinsuring company, which paid nothing for the business, is permitted by the judgment of the Supreme Court

of Illinois to retain all the benefits of those policies as good paying insurance business and appropriate petitioners' interest therein to its own purposes without compensation therefor.

(8) The Supreme Court of Illinois fails to distinguish between termination of the petitioning agents' contracts by receivership in the sense that the two who were still active could no longer solicit prospective purchasers, and termination in the sense that the said agents could thereby be deprived of property rights already vested in them.

(9) The Supreme Court of Illinois ignores the fact that all but two of the petitioners' contracts had been terminated prior to receivership so far as solicitation of business was concerned, the renewal commissions continuing to be paid, so that there can be no doubt of the vested property rights of petitioners.

(10) The judgment of the Supreme Court of Illinois is the first time any court of last resort in any state has denied such claims as those in suit both against the receiver of an insolvent insurance company and against the company reinsuring its business.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Illinois, commanding that Court to certify and send to this Court for its review and determination as provided by the statutes of the United States a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 25695, People of the State of Illinois *ex rel.* Palmer *vs.* Peoria Life Insurance Company, a corporation; In the Matter of Claims of Margaret Harwick, *et al.*, Appellants *vs.* Charles V. O'Hern as Receiver of Peoria Life Insurance Company, *et al.*, Appellees", to the end that this cause may be reviewed and determined by this Court

as provided for by the statutes of the United States and the judgment therein of said Supreme Court of the State of Illinois be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the Court may seem just and proper.

Dated October 10, 1941.

Margaret Harwick, Assignee of Hugh E. Van DeWalker; Fidelity and Deposit Company of Maryland, Assignee of George C. Berra; T. A. Curnow; Thomas E. Rogers; Edwin B. Seidel; C. H. DeLong; and W. H. Logan,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Supreme Court of Illinois is reported in 376 Ill. 517. This is the opinion of June 12, 1941, modifying unreported opinion filed April 15, 1941, denying petitioners' petition for rehearing, and reversing unreported opinion filed December 16, 1940. The opinion of the Appellate Court of Illinois, Second District, is reported in 303 Ill. App. 430.

II.

Jurisdiction.

(1) The date of the decree to be reviewed is June 12, 1941; rehearing denied the same date.

(2) The statutory provision sustaining the jurisdiction of this Court is Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A., Title 28, Section 344). Throughout the course of this litigation in the state courts of Illinois, the petitioners have preserved the constitutional question of due process of law under the Fourteenth Amendment to the Constitution of the United States. The claims as originally filed presented this ground, which has been preserved in every succeeding step of the litigation.

(3) Cases typical of those believed to sustain jurisdiction are as follows:

Standard Oil Co. v. *Missouri,* 224 U. S. 270, 281.

Roller v. *Holley,* 176 U. S. 407, 20 S. Ct. 410, 44 L. Ed. 520.

Nord v. *Griffin,* (C. C. A. 7) 86 Fed. (2d) 481; Cert. Den. 57 S. Ct. 611, 300 U. S. 673, 81 L. Ed. 879.

Boynton v. *Moffat Tunnel Improvement District,* (C. C. A. 10) 57 Fed. (2d) 772; Cert. Den. 53 S. Ct. 20, 287 U. S. 620, 77 L. Ed. 538.

III.

Statement of the Case.

Petitioners believe the recital of facts contained in the "Summary Statement" in the accompanying petition for writ of certiorari constitutes a sufficient statement to serve this Court in its consideration of this brief. The same is, therefore, hereby adopted and made a part hereof.

IV.

Specification of Errors.

The errors in the judgment of the Supreme Court of the State of Illinois, which are relied on by petitioners in this case, are set out in the statement of "Reasons Relied On for the Allowance of the Writ" in the accompanying petition for writ of certiorari. Petitioners will rely upon and urge before this Court all errors therein assigned. Same are, therefore, hereby adopted and made a part of this brief.

V.

ARGUMENT.

Summary.

1. **Reasonable Notice and an Opportunity to Be Heard Are the Essence of Due Process, and Petitioners Had No Notice and No Hearing and Have Been Denied Due Process.**

2. **Petitioners Do Not Stand in the Position of Creditors Entitled Merely to a Pro Rata Share in the Assets of the Peoria Life Insurance Company, Since the Receivership of That Company Was Not a Liquidation in the Sense of a Sale of Assets and a Pro Rata Distribution to Creditors.**

3. **But Even in the View of This Case That the Receivership of the Peoria Life Was a True Liquidation, Petitioners Have Been Deprived, Without Due Process, of Their Rights as Creditors.**

4. **Each Petitioner Had an Absolute Vested Right in His Renewal Commissions in the Amount Fixed by His Agency Contract on Every Policy Written by Him, From the Moment the Policy Was Issued by the Company.**

(a) *This has been established as the law in similar insurance cases.*

(b) *The right of an insurance agent to his renewal commissions is so definitely vested at law that his trustee in bankruptcy or an assignee for benefit of creditors can demand payment of them.*

(c) *Petitioners have a property right in the nature of an equitable lien which attaches to each premium on policies written by them, as it is paid, to the extent of petitioners' renewal commission interest therein.*

(d) *As either respondent receives premiums on policies of insurance written by petitioners an implied trust is created, and such respondent becomes a trustee for the benefit of petitioners of their renewal commission interest in such premiums.*

5. Petitioners' Rights Were Not Dependent on the Continued Existence of the Peoria Life Insurance Company as Such, or Upon Any Other Person or Thing the Destruction of Which Could Destroy Petitioner's Rights.

1. Reasonable Notice and an Opportunity to Be Heard Are the Essence of Due Process, and Petitioners Had No Notice and No Hearing and Have Been Denied Due Process.

The Circuit Court of Peoria County, Illinois, in its decree entered March 4, 1938, in this case (Abst. 160) expressly found as follows:

> "That there was no attempt made to serve the claimants [petitioners here] with summons or written notice of the proposed entry of a decree at any time before the decree of August 22, 1934, approving the reinsurance contract entered into herein, but, however, that all of the creditors herein knew of the receivership proceedings pending in this court prior to the decree of August 22, 1934."

Here is an express finding by the trial court, and there is no contradictory evidence, that petitioners were not served with any process or any notice prior to the hearing at which a decree was entered which, so the Supreme Court of the State of Illinois now says, destroyed their rights.

That petitioners had general knowledge that receivership proceedings were pending is admitted, but it is also undenied by all parties that petitioners had no knowledge that any specific decree which would affect their vested interests would be entered on that day or at any other time. The general knowledge of a receivership proceeding to which petitioners were not parties is not sufficient where property rights are involved. The law insists that where property rights are at stake the courts must insure the fact that those parties having a vested interest are fully informed and have an opportunity to be heard before any valid decree can be entered affecting their rights.

The decree of August 22, 1934 (Abst. pp. 45-48), entered nine months after a receiver was appointed for the Peoria Life,

(a) approved the Reinsurance Agreement subsequently entered into by the Alliance Life and the Receiver of the Peoria Life (Par. 4 (a), Abst. 46);

(b) found that the contracts of insurance of the Peoria Life "* * * are hereby revived and renewed * * *" (Par. 3, Abst. 45);

(c) decreed: "That all contracts, written or oral, entered into by the Peoria Life Insurance Company for the services of persons to act as agents, managers or supervisors, or to sell contracts of insurance or collect premiums thereon due to the Peoria Life Insurance Company, be, and the same are, and each of them is hereby disaffirmed as of November 15, 1933, the date of the entry of order of liquidation in the above entitled cause and the date of the appointment of the receiver" (Par. 4 (e), Abst. 46).

The Reinsurance Agreement approved by the above mentioned decree was subsequently signed in the form approved, on October 4, 1934, by the Alliance Life and by the Receiver of the Peoria Life. In that Agreement (Abst. 51-62) among other things it was provided that,

(a) "The Company [Alliance Life] does hereby reinsure and assume as of November 15, 1933 (subject to the liens, terms, conditions and provisions, and only to the extent herein specifically provided) the liability of the Peoria Life under all policies and contracts of insurance * * * issued or assumed by the Peoria Life and outstanding and in force on the books and record of the Peoria Life on November 15, 1933 * * *" (Par. 2, Abst. 52).

(b) "The Company [Alliance Life] does not assume any obligation under any contract heretofore made by the Peoria Life with any agent (regardless of the classification), manager or supervisor, or with any other person, persons, or corporation for personal service." (Par. 37, Abst. 59.)

(c) The Receiver should make transfer to the Alliance Life of the assets of the insolvent company, retaining, however, sufficient funds to satisfy the expenses of receivership and the claims of dissenting policy holders and other creditors or claimants; and it was further provided that if the Receiver should transfer to the Alliance Life a larger amount than it was entitled to receive the Receiver's deficiency should be made up by a return of funds from the Alliance to the Receiver. (Par. 27, Abst. 57.)

(d) "If any clause, sentence, paragraph or part of this agreement shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such judgment shall not affect, impair, invalidate or nullify the remainder of this agreement, but the effect thereof shall be confined to the clause, sentence, paragraph or part thereof immediately involved in the controversy in which such judgment or decree shall be rendered." (Par. 56, Abst. 62.)

To sum up the matter, as is said in Cooley, *Constitutional Limitations* (8th Ed.), page 774:

> "There is no rule or principle known to our system, under which private property can be taken from one

person and transferred to another, for the private use and benefit of such other person, whether by general law or specific enactment."

It is submitted that the case of these petitioners involves the deliberate action of a court of equity in destroying vested property rights of petitioners without any oral or written notice, service or process of any kind and an attempt by decree to terminate the interest of petitioners in a future income guaranteed under the provisions of their agent's contracts recognized by the Peoria Life in cases where the contracts themselves had been terminated by mutual consent—all done under the guise that receivership gave complete absolution and permits the reinsuring company to retain the benefit of the insurance business written by petitioners without assuming the burdens inseparable therefrom.

One of the respondents has argued that petitioners should have appealed from the decree of August 22, 1934, if they were not satisfied with it. Manifestly, petitioners could not have appealed from a decree in a proceeding to which they were not parties, and if they had intervened they probably would be deemed to have taken the case as they found it, even assuming that the court would have permitted intervention, which is doubtful in view of the construction subsequently given the decree, to-wit: That it deprived plaintiffs of all their rights, so that they would have had no standing as intervenors.

The net result is that petitioners were given no notice or opportunity to be heard prior to the entry of a decree which has been interpreted by the courts of Illinois to deprive them of all their rights. This is not due process of law under any view of the Constitution.

It is by no means clear that the Circuit Court of Peoria County in entering the decree of August 22, 1934, complained of, which "disaffirmed" petitioners' contracts, had in mind the destruction of said contracts as to commission

interests already fully earned and acquired by petitioners. This is immaterial, however, since, whatever the Circuit Court may have had in mind, the Appellate and Supreme Courts of Illinois have given that effect to the Circuit Court's decree.

The Appellate and Supreme Courts of Illinois have construed said decree to destroy petitioners' rights to renewal commissions earned prior to November 15, 1933, and have, therefore, by their opinions themselves deprived petitioners of their property without due process of law. That neither the Circuit Court nor either of the respondents had in mind the full effect subsequently given its decree by the Appellate and Supreme Courts is indicated by the fact that the Receiver has paid to petitioners commissions on renewal premiums paid into the Peoria Life prior to the date of receivership but not paid to petitioners prior to that date. If the holding of the Supreme Court of Illinois is correct then the Receiver should not have paid said renewal commissions to these agents. This leads petitioners to believe that the decree of August 22, 1934, correctly interpreted, has no other effect and should be given no other effect than did the appointment of the receiver, that is, to terminate the right of the agents to act after the date of receivership in securing applications, writing policies, etc. See the case of *C. B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226.

2. Petitioners Do Not Stand Merely in the Position of Creditors Entitled Only to a Pro Rata Share in the Assets of the Peoria Life, Since the Receivership of That Company Was Not a Liquidation in the Sense of a Sale of Assets and a Pro Rata Distribution to Creditors.

It is the opinion of the Supreme Court of Illinois that the Reinsurance Agreement was only a step in the liquida-

tion proceedings of the Peoria Life and that there is no merit in the contention of petitioners that by the provisions of said Reinsurance Agreement, the Alliance Life is not a purchaser but is a reinsurer and something more, inasmuch as it took over all the business of the Peoria Life and, therefore, assumed all the burdens inseparable therefrom; and that for all practical purposes the Alliance Life stands in place of the former company and is, therefore, liable for commissions to petitioners and other agents whose efforts created a large portion of the insurance business of the Peoria Life now enjoyed by the Alliance Life.

That the Reinsurance Agreement was not a move to liquidate the affairs of the Peoria Life is shown by an order entered in the receivership proceedings November 23, 1933. This order was entered to authorize the Receiver to pay to other insurance companies premiums on policies which the Peoria Life had reinsured in those companies. Paragraph (5) thereof (Additional Abst. 12) says in part:

> "That said Receiver, pursuant to the order of this Court, expects to solicit written proposals for contracts for the reinsurance, rehabilitation, or reorganization of the respondent, and that it is for the best interests of said Company and its policy holders, creditors, and all parties having an interest in said company, to maintain, protect and conserve the business and good-will of respondent, pending the order of this Court, upon any bids which may be made for the reinsurance, rehabilitation or reorganization of the respondent, • • •"

The same order recites in Paragraph (e) (Additional Abst. 15, Rec. 55-58):

> "That in no event shall the Receiver pay any premium on any such contract of reinsurance unless the company to which said premium shall be paid shall issue to the Receiver at the time of such payment a receipt therefor, in which said reinsuring company shall agree to return such reinsurance premium to the Receiver, should the Peoria Life Insurance Company

not be reinsured, reorganized or rehabilitated by order of this Court, and the Company be liquidated in accordance with the original order of liquidation entered in this Court on the 15th day of November, 1933."

The foregoing quotations show eloquently what was actually in the minds of everyone concerned immediately after the bill for receivership was filed; that is, that the liquidation should be abandoned and the business rehabilitated and reinsured, and this is what actually was done.

The final paragraph of said order (Additional Abst. 16-17) provided:

"It is further ordered, adjudged and decreed that jurisdiction of this cause and of the parties hereto be, and the same is hereby reserved and retained by the Court for the purpose of further modifying, extending or changing the orders entered in the above entitled cause on November 15, 1933, directing the said Receiver to liquidate the assets and affairs of said respondent to the extent necessary or advisable in the opinion of the Court, in order to consummate any plan or contract of reinsurance, rehabilitation or reorganization of said respondent, which shall be approved by the Court."

As further evidence that liquidation was abandoned and replaced by rehabilitation through reinsurance, petitioners call attention to the preamble of the Reinsurance Agreement approved by the Court which (Abst. 52) recites:

"Whereas a large part of the assets of the Peoria Life Insurance Company is invested in that class of securities which has depressed greatly with current depression markets and a great loss would accrue to the policy holders of such company, their beneficiaries and their dependents, if forced liquidation of all assets were undertaken in present markets."

Attention has already been directed to the provision of Paragraph 3 of the decree of August 22, 1934 (Abst. 45), finding that the policies of Peoria Life "* * * are hereby revived and renewed".

It was expressly provided in the decree approving the Reinsurance Agreement that all policy holders who did not expressly dissent therefrom should be bound by said decree and, as a matter of fact, the assenting policy holders were in the great majority. As to policies written by petitioners whose holders dissented from the new arrangement, petitioners make no claim except for commission accrued and unpaid at the date the bill for receiver was filed. The assenting policy holders are in a different category. As to them there was actually no receivership but rather a rehabilitation proceeding, their policies continuing in force uninterruptedly and the premiums being paid thereon remaining the same so far as is material here.

As further proof that as to the dissenting policy holders there was no true liquidation, it may be stated that the Alliance Life paid nothing for the business reinsured, is not obligated to make any payment therefor, is recompensed for all its work in connection with said business by a schedule of fees and charges contained in the Reinsurance Agreement, and is entitled to the benefit of the appreciation in the assets of the Peoria Life and to take over the entire business as its own property on January 1, 1949.

3. But Even in the View of This Case That the Receivership of the Peoria Life Was a True Liquidation, Petitioners Have Been Deprived Without Due Process of Their Rights as Creditors.

Up to now, we have presented this case from the standpoint that petitioners have a vested property right in all the renewal premiums which have been and are being paid from time to time on the outstanding policies of the Peoria Life written by them and now taken over by the Alliance Life.

The case has another aspect, however, and that is as

to the rights of the petitioners to the present value of their renewal commissions because of the receivership and transfer of the business and assets to another Company and the refusal of the receiver and the Reinsuring Company to pay. A leading case on this subject in which numerous decisions affecting not only the right to recover under these circumstances, but also the measure of damages are discussed is *Wells* v. *National Life Insurance Association,* 99 Fed. 22.

Plaintiff there entered into a contract by which he became the General Agent for an Insurance Company for a term of years within a specified territory. He was to have charge of the territory and to devote his services to the business of establishing sub-agents, etc., and his sole compensation was made up of commissions on the initial and renewal premiums received from the business he secured. It was held, in an action for breach of the contract by the defendant in transferring the business to another agent during the term without just cause, that the plaintiff might show as a measure of damages the commissions which would have accrued to him under the contract from the renewal commissions under policies actually written by him, and also the amount of new business done by the defendant within the territory through the new agents and that these factors were proper to be considered by the jury.

In discussing the manner of assessment of damages, the court in its opinion in the *Wells* case refers to the following: *Aetna Life Ins. Co.* v. *Nexsen,* 84 Ind. 347; *Lewis* v. *Atlas Mutual Life Ins. Company,* 61 Mo. 534.

The cases cited hold that such damages are not too remote, speculative or uncertain. Computation of the present value of renewals is a common actuarial practice, recognized and used by all Insurance Companies and recognized and used by the Peoria Life some years prior to receivership in computing the valuation at which Peti-

tioner Logan purchased the interest of the General Agent whom he succeeded.

This general principle of damages for an anticipatory breach is summed up conclusively in the leading case of *Lovell* v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, where the court said:

> "Where one party to an executory contract prevents performance, or puts it out of his power to perform, the other party may regard it as terminated and demand damage he has sustained thereby."

In discussing the rights of petitioners, we can not overlook the sound, basic principle of law which has been repeatedly pronounced by this court with reference to damages for an anticipatory breach. It was held in the leading case of *Roehm* v. *Horst*, 178 U. S. 1, that the anticipatory breach of an executory contract might properly be the subject matter for damages and that the plaintiff therein was entitled to compensation for the damages he sustained by the breach of the other party down to the time of complete performance.

In this case, however, Respondents have argued and the court has ruled that the original decree of liquidation of the Peoria Life makes the proceeding comparable to a bankruptcy action in establishing a permanent barrier to the enforcement of the vested rights of petitioners. Adopting this argument for the moment; namely, that this receivership is comparable to bankruptcy, it is interesting to find that the case of *Central Trust Co.* v. *Chicago Auditorium Ass'n*, 240 U. S. 581, holds that rights similar to those asserted here are provable in bankruptcy and that a claimant is entitled to the full amount of the damages caused by the anticipatory breach.

In the *Auditorium* case, a Livery Company made a contract for a term of years to handle the livery business for the Auditorium Hotel in Chicago. The Livery Company

had engaged in the performance of its contract for only about six months of the five year term covered by the agreement when it was forced into bankruptcy. Certain specific payments were to be made by the Livery Company for the privileges provided, which amounts were definitely specified and payable monthly. The claim of the Hotel was allowed for the portion accrued prior to bankruptcy, but both the District Court and the Circuit Court of Appeals decided that the Hotel could not collect for the balance of the term.

This court, however, in its opinion held that the Hotel had a provable claim for the entire term, since the contract was in full force and effect at the date of bankruptcy and that the intervention of bankruptcy constituted such a breach as to entitle the claimant to full allowance.

It should be remembered that in the present case the contracts were no longer executory, having been fully performed by petitioners prior to the receivership. If the anticipatory breach of an executory contract is a provable claim in bankruptcy, how much more force must be given to the claim of a party who, having fully executed his contract and obtained a vested interest in his compensation thereunder, presents his claim for allowance in bankruptcy. Adopting, for argument only, the proposition that the receivership in this case is kindred to bankruptcy, we can come to no other conclusion than that petitioners have a proper provable claim against the receiver and that damages should be awarded to them.

The opinion of the Supreme Court of Illinois recognizes that petitioners have asserted their claims, both as against the receiver of the insolvent Company and against the reinsuring Company, but it grants no recovery or remedy against either. By its judgment in this regard, petitioners have been inequitably and unfairly discriminated against as compared with other creditors of the Peoria Life whose

claims have been allowed and paid and have thereby been deprived of their property without due process of law.

4. Each Petitioner Had an Absolute Vested Property Right in His Renewal Commissions in the Amount Fixed by His Agency Contract on Every Policy Written by Him, From the Moment the Policy Was Issued by the Company.

(a) *This has been established as the law in similar cases.*

Petitioners were to receive their renewal commissions as premiums were paid. These commissions were under the terms of their contracts to be paid solely for their original work in securing the policies. Once the policies were written, the agents had fully performed and nothing more remained to be done by them. This fact is not in dispute. It is petitioners' contention that once they wrote a policy of insurance, they had a vested right therein in the amount of their commission interest, so long as premiums continued to be paid.

A case clearly sustaining this proposition is *General American Life Ins. Co.* v. *Roach*, 179 Okla. 301, 65 Pac. (2) 458 (Okla. 1937). In the *Roach* case, the agent had an original contract with the International Life Insurance Company, which company was subsequently acquired and all its contractual obligations assumed by the Missouri State Life Insurance Company. In 1933 this latter company became insolvent and was taken over by the Superintendent of Insurance for the State of Missouri, who acted directly, as provided by the law of that state, in lieu of appointing a receiver. Later, the Superintendent of Insurance, with the approval of the court, entered into a reinsurance contract with the General American Life, defendant in the *Roach* case. In the reinsurance contract it was provided that:

"The new company does not assume any obligation

under any contract whatever made or assumed by the old company with any agent, whether manager, supervisor or otherwise, but as a part of this agreement and as a condition precedent to its acceptance, it is agreed that all such contracts and all contracts of whatever kind and character for personal service shall be cancelled and terminated as of or prior to the date of the execution of this agreement."

The Oklahoma Supreme Court in the *Roach* case held that the agent not only had a property right vested in him from the moment that he sold the policy, entitling him to all renewal commissions provided by his agency contract, but also that the attempt which was made to reduce it to the extent of a lien percentage of fifty per cent was of no effect. Quoting from the decision (p. 460, as reported in Pacific Reporter, 2d Series):

"We believe that Roach's right to receive five per cent of the renewal premiums became vested as soon as the policy has been taken. (*Hale* v. *Brooklyn Life Ins. Co.*, 46 Hun. 274); that this right is his property, and when a renewal premium is received by the collecting company, his share thereof is held for him (*Michigan Mutual Life Ins. Co.* v. *Coleman*, 118 Tenn. 215, 100 S. W. 122); and this right existed so long as the policy continued in existence and payments were made by the policy holders, limited in time by the contract (*Hercules Mutual Life Assurance Society* v. *Brinker*, 77 N. Y. 435).

* * *

"When payment of the renewal premium is made by the policy holders to the collecting company, the interest of the plaintiff therein, and the right to receive the same attaches thereto simultaneously with the collection. That percentage of such premiums belongs to the plaintiff and never is the property of the defendant. In our opinion, taking into consideration the contractual relations between the parties, the International Life Insurance Company and its successor, including the defendant, stood in a trust capacity toward the plaintiff."

The court in its opinion in the *Roach* case discusses various provisions common to these agency contracts, many of which are substantially identical with those appearing in the contracts of petitioners. There is a provision, for example, that the Insurance Company is to have a lien upon any money in its possession, including renewal commissions belonging to the agent, to secure any indebtedness of the agent to the Company. There is the provision that the commission shall accrue only as the premiums are paid to the Company in cash; and there is the further provision that if the Company should refund any premium on any policy, the agent must repay on demand any commission received on such premium.

Commenting upon these matters, the court says in the *Roach* case (p. 460), as reported in the Pacific Reporter, 2nd Series:

> "That a portion of the renewal premiums collected belong to the plaintiff coincidental with collection is clearly indicated by the provisions of the contract. * * * The Company is to have a lien upon any moneys in its possession belonging to the agent, to secure agents' indebtedness to the Company. There are other provisions in the contract not as material as these, but which lend to support these, and nothing in the contract is susceptible of a contrary interpretation. Agent could not create a lien upon something which was not his, therefore, he by giving and the Company by accepting the lien, definitely stamped the percentage collected as the agents. In addition, under certain circumstances, agent was to pay Company for its services in collecting his percentage. The conclusion that both treated this percentage as his is inescapable."

Another case from Oklahoma squarely in favor of petitioners' contentions here is the case of *Alliance Life Insurance Company* v. *Landrum*, No. 29090 in the Supreme Court, State of Oklahoma, handed down March 12, 1940, and reported in 101 Pac. (2) 1058 (Advance Sheets only), rehearing denied April 2, 1940.

In the *Landrum* case the defendant Alliance Life is the same Alliance Life Insurance Company which is a respondent here. The plaintiff Landrum was a former agent of the Old Colony Life Insurance Company, an Illinois corporation which had been placed in receivership in 1932 under the same statute under which the Peoria Life receivership was instituted. The Old Colony Life Insurance Company was reinsured by the Alliance Life, the Respondent here.

As in the instant case, the Alliance Life refused to pay Landrum renewal commissions on insurance policies written by him for the Old Colony Life Insurance Company and subsequently acquired by the Alliance Life under its reinsurance agreement, and, therefore, suit was instituted. The reinsurance agreement in question, like that in this case, provided that the Reinsuring Company did not assume any of the agency contracts of the Company reinsured. From a judgment of the District Court of Oklahoma finding in favor of the agent and ordering an accounting, the Alliance Life appealed. The Supreme Court of Oklahoma sustained the judgment of the District Court in its entirety and remanded the case, with directions to proceed with an accounting.

In seeking to discover why the *Landrum* case was not reported in the bound volume of the Pacific Reporter and the Oklahoma State Reports, petitioners learned that the opinion in that case was withdrawn and vacated by the Oklahoma Supreme Court under date of June 11, 1940, subsequent to the filing in that court of a satisfaction of judgment dated June 8, 1940, wherein the plaintiff Landrum acknowledged full payment, settlement, and satisfaction of the judgment previously entered in his favor against the Alliance Life.

The basis for the *Roach* and *Landrum* decisions is not new or novel, but this same proposition of law has followed down through the years, recited again and again by courts of last resort in leading jurisdictions of this country.

In the case of *Michigan Mutual Life Ins. Company* v. *Coleman,* 118 Tenn. 215, 100 S. W. 122, the question involved was whether the agent's interest in renewal premiums paid to the Company was forfeited on his discharge. The court held that it was not and that the General Agent in sacrificing the greater part of the first year's commission to some sub-agent was not only clearly augmenting the Company's business, but was building up for himself a vested estate in renewals.

In *Hale* v. *Brooklyn Life Ins. Co.,* 46 Hun. (N. Y.) 274, suit was brought to recover commissions on renewal commissions received by the Insurance Company. Judgment was rendered for the agent, the court saying:

> "During the existence of the contract, the plaintiff's right to commissions on premiums received by the Company after the premium for the first year had been fully paid becomes vested as soon as the plaintiff caused a policy to be taken out. The subsequent abrogation of the contract of employment by mutual consent would not deprive him of his right. So far as the contract remained executory, the agreement to terminate it destroyed it as to both parties but to this extent it had been executed by plaintiff, and the mutual abandonment of the contract would not take away his right to renewal commissions already earned, any more than the expiration of the contract by the efflux of time would have done at the end of a year from the date of the agreement. In any action for goods sold or delivered, the plea that the sale and delivery were made under a contract which has subsequently been wholly annulled and rescinded by both parties constitutes no defense. (*Edwards* v. *Chapman,* 1 Mess. & W. 231.) So far as the policies are concerned on which the plaintiff claims renewal premiums, the Insurance Company has derived all the benefit which was intended under the contract, and the agreement to rescind does not bar the agent from recovering his just compensation."

In the *Hercules Mutual Life Assurance Society* v. *Brinker* case, 77 N. Y. 435, suit was brought by an Insurance Company against an agent for an accounting. The agent set up a claim against the Company or its receiver for renewal commissions, which had been collected by the Company but not paid. *Held,* it was liable to pay these commissions. We refer the court to the fine discussion contained in the opinion in this case with reference to the interest of the agent in renewal premiums and his right to recover his commissions from his principal or its successor.

Another leading case on this subject was decided by the Supreme Court of Iowa and has had frequent citation ever since it was handed down. In *Schrimplin* v. *Farmers' Life Assurance Company,* 123 Iowa 102, 98 N. W. 613, the Bankers Guaranty Life Association agreed with the agent that he should receive one dollar per year on each one thousand dollars insurance obtained by him, such payments to continue as long as the policies remained in force. Subsequently, the Bankers Guaranty was absorbed by the defendant, and the assets and business of the old Association were transferred to the new Company. The new Company attempted to repudiate all obligations to the agent. Thereupon, the agent brought suit, contending that he had the same interest in the renewals that he had prior to the transfer. The suit was in the nature of an accounting for commissions on premiums already collected.

The Supreme Court of Iowa allowed recovery and in the course of its opinion, said, in part, page 615, as reported in the Northwestern Reporter:

> "It may be true that his claim of a continuing interest in the renewals was something of an encumbrance upon the future income of the association. But the same may be said of any debt or obligation payable in the future. No attempt is made to show that the compensation for plaintiff's services, as provided by the contract, is unreasonable or extravagant in amount, or

> that the contract was obtained by fraud or by collusion with the officers of the association. • • • If the agent secures no business for the Association he receives no pay, but if he does secure business, then the income received therefrom is charged with the agent's agreed commission or share; in other words, the business procured by him pays its own expenses. Nor is there anything essentially vicious or wrong in agreeing to pay the agent some reasonable compensation from renewals received upon the insurance negotiated by him. *Such contract, as is well known, has the sanction of long usage in the insurance world.* • • •"

In the present case it is clear that the Alliance Life, which had already been in the insurance business for many years under the corporate name of Life & Casualty Company of Chicago, executed the reinsurance contract with the receiver with its eyes open and with full knowledge that insurance agents customarily have an interest in renewal premiums. That it did know this to be the situation in the Peoria Life case is shown by the fact that in the reinsurance agreement it sought to repudiate the obligation.

(b) *The right of an insurance agent to his renewal commissions is so definitely vested at law that his trustee in bankruptcy or an assignee for benefit of creditors can demand payment of them.*

In re Wright, 157 Fed. 544.

Knevals v. *Blauvelt*, 82 Maine 458, 19 Atl. 818.

Green v. *Bartholomew*, 34 Ind. 235.

(c) *Petitioners have a property right in the nature of an equitable lien which attaches to each premium on policies written by them, as it is paid, to the extent of petitioners' renewal commission interest therein.*

Barnes v. *Alexander*, 232 U. S. 117.

Geddes v. *Reeves Coal & Dock Co.*, 20 Fed. (2nd) 48.

U. S. Fidelity & Guaranty Co. v. *Fidelity Trust Co.*, 153 Pac. 195 (Okla.).

Pomeroy, Equity Jurisprudence, Vol. 3, Sections 1235, 1236, and 1237.

(d) *As either respondent receives premiums on policies of insurance written by petitioners, an implied trust is created, and such respondent becomes a trustee for the benefit of petitioners of their renewal commission interest in such premiums.*

General American Life Ins. Co. v. *Roach*, 179 Okla. 301, 65 Pac. (2) 458.

Geddes v. *Reeves Coal & Dock Co.*, 20 Fed. (2) 48.

Bogert, Trusts and Trustees, Vol. 3, Sec. 471.

5. Petitioners' Rights Were Not Dependent on the Continued Existence of the Peoria Life Insurance Company as Such, or Upon Any Other Person or Thing the Destruction of Which Could Destroy Petitioner's Rights.

In the opinion of the Illinois Supreme Court in this case, it is said (376 Ill. 517, 521-2):

> "In contracts which require the continued existence of the particular person or thing, the destruction or death of that person or thing will terminate the agreement. (*Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610; 2 Restatement of Contracts, sec. 458.) The agency contracts here in question were necessarily, and as a matter of law dependent for their continued existence upon the lawfully continued existence of the Peoria Company and the parties are conclusively presumed to have entered into those contracts in contemplation of the possibility of the insurance company's insolvency and its liquidation under the Insurance Liquidation act above cited."

The case of *Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610, cited by the court, was a case in which the Emerich Company rented space in Chicago from Siegel Cooper & Co. for a term of five years. About a year after the execution of the lease the building was partially destroyed by fire and the lessees moved out. This was an

action in assumpsit by the lessee to recover damages for the breach of a written contract. The holding was that because the building was untenantable and incapable of being repaired Siegel Cooper & Co., lessors, were excused from future performance under the lease.

If the case now before the court was a suit by the petitioning agents for damages because they were not permitted after November 15, 1933, to solicit further policies of insurance, the Emerich case might be applicable, but such is not the situation. Petitioners are not seeking damages for the loss of the privilege of soliciting insurance after the bill for receivership was filed, but are suing for compensation for services wholly performed before that date, and the Emerich case, since it was not a suit in which lessee had paid the rent for the full term before the fire, is not applicable or pertinent here.

Furthermore, petitioners' contracts clearly contemplated that renewal commissions would be paid so long as the policies remained in force, regardless of the continuation in business of the Peoria Life Insurance Company. Section 31 of Petitioner Curnow's contract, for example (Abst. 87-88; Rec. 193), provides that in case governmental authorities should make regulations or enact laws, or should other contingencies arise or conditions exist, making it undesirable or inexpedient for it to continue to transact business, the Peoria Life reserves the right and has the right to withdraw from doing business and to terminate its contract with the agent, in which event it is provided however that the agent shall have no claim against the Company for compensation except for *commissions previously acquired*, nor shall any lien of Company upon any commission interest of the agent be affected.

Respectfully submitted,

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(25)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST MONROE, CHICAGO

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IN THE

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OCTOBER TERM, A. D. 1941.

No. 700.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

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Respondents.

Brief for Respondents in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW.

The judgment and opinion of the Supreme Court of Illinois involved is reported in 376 Ill. 517. That court affirmed the judgment of the Appellate Court for the Second District of Illinois, whose opinion is reported in 303 Ill. App. 430.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered on April 15, 1941 (R. 341, 342), rehearing denied June 12, 1941 (R. 403). Time for filing petition for writ of certiorari was extended to and including October 13, 1941, by an order of an Associate Justice of the Supreme Court of the United States entered September 5, 1941 (R. 408, 409). Petition for writ of certiorari was filed October 13, 1941, and notice thereof served on respondents on October 21, 1941.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A. Title 28, Section 344).

Questions Presented.

1. Whether, in a proceeding for the liquidation of the Peoria Life Insurance Company, in which petitioners as former agents of the insolvent company filed their claims, presented evidence, and were heard as to the merits thereof by the same court in which the liquidation proceeding was pending, resulting in an allowance in part and a denial in part of their claims, petitioners were deprived of property rights without due process of law, contrary to Article XIV of the amendments to the Constitution of the United States.

2. Whether petitioners, in being denied recovery of commissions in respect of premiums falling due and paid after November 15, 1933, to the receiver of the Peoria Life Insurance Company and the Alliance Life Insurance Company, were deprived of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

Statutes Involved.

The pertinent provisions of the Illinois Insurance Liquidation Act of 1925, as amended in 1929 (Ill. Rev. Stat. 1933, Chap. 73, Secs. 105 (2), 105 (4)), are as follows:

105 (2). "Whenever any resident company (a) is insolvent * * * (k) on consent of a majority of the directors, stockholders or members of such resident company, then the director shall report any such case to the Attorney General of this State whose duty it shall be to apply forthwith by petition of the director in the name of the People of the State of Illinois to the Circuit Court of the county in which the principal office of such company in this State is located for an order directing such company, upon such notice as the Circuit Court may prescribe, to show cause why a receiver should not be appointed as hereinafter set forth to take possession of its property and conduct its business, and for such other relief, as the nature of the case and the interests of its policyholders, creditors, members, stockholders or the public may require.

* * * * *

105 (4) "If * * * the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of such receiver, who * * * shall be vested by operation of law with title to all of the property, contracts and rights of action of such company as of the date of the order so directing liquidation. * * * The rights and liabilities of any such company, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such company. * * *"

STATEMENT.

The Facts Summarized.

On November 15, 1933, the Circuit Court of Peoria County, Illinois, entered its order for the liquidation of the Peoria Life Insurance Company, insolvent, and directing the receiver to proceed to liquidate the company forthwith, all in accordance with the Illinois Insurance Liquidation Act of 1925. In the course of liquidation, a decree was entered August 22, 1934, approving the reinsurance of policies whose holders consented on terms provided in an agreement with the Life and Casualty Company whose name was later changed to Alliance Life Insurance Company (R. 49). All persons having claims against the assets of the Peoria Life Insurance Company were required to file proofs of claim within ninety days. The petitioners herein filed their claims for commissions on premiums paid to the Peoria Life Insurance Company prior to November 15, 1933, which claims were allowed, and filed claims for commissions on premiums paid to the receiver (and by him to the Alliance) or paid to the Alliance, which claims were disallowed.

The petitioners herein then appealed from the order of the Circuit Court disallowing their claims, first, directly to the Supreme Court of the State of Illinois, alleging the same constitutional question that is made the basis of the present petition. The Supreme Court of Illinois ordered the case transferred to the Appellate Court on the ground that no constitutional question was involved. The Appellate Court affirmed the Circuit Court and then, upon appeal from the Appellate Court, the Supreme Court affirmed the judgment of the Appellate Court. A detailed statement of facts with appropriate references to the record follows.

The Facts in Detail.

The People of the State of Illinois, *ex rel.* Ernest Palmer, Director of Insurance of the State of Illinois, on November 15, 1933, filed their petition in the Circuit Court of Peoria County, Illinois, alleging impairment of the capital and reserves and praying for an order to show cause to be directed to the Peoria Life Insurance Company, Peoria, Illinois, why an order should not be entered finding that sufficient cause existed for liquidation of the business and affairs thereof, and after hearing thereon for an order of liquidation (R. 43).

On the same day the respondent company entered its appearance and consented to the immediate entry of an order, and the court, after hearing, entered its order that the receiver, when appointed pursuant to the statute of Illinois, "immediately take possession of the books, records, property, assets, and affairs of the said defendant corporation, and proceed to liquidate the same forthwith." (R. 245-248.)

Pursuant to said statute the Director of Insurance, on November 15, 1933, appointed the Receiver (R. 248-249), who immediately took possession and proceeded to liquidate the affairs of said company and is now so acting.

In two cases arising out of the liquidation proceeding the Supreme Court of Illinois decided that the receiver was a statutory receiver vested by operation of law with title to all the assets of the insolvent company and not a receiver by appointment of the court (*People* v. *Niehaus*, 356 Ill. 104, 112), and that the receiver as a liquidating officer, not the Circuit Court, had power, under the Illinois statute, to liquidate the business and affairs of the insolvent company. (*People* v. *Peoria Life Ins. Co.*, 357 Ill. 486, 491.)

On July 20, 1934, the receiver filed his inventory, his report of steps taken by him, copies of proposals received

by him from going insurance companies and from others, together with his recommendations, and asked that the court confirm his acts, fix a date for filing of claims, and provide for notice thereof. On August 22, 1934, the Circuit Court, after full hearing, entered its decree (R. 45), specially finding (1) That the receiver had given notice of that hearing to parties in interest of record, and (2) That the reinsurance agreement of the Alliance Life Insurance Company recommended by the receiver, "in its final form is in accord with the plan of liquidation adopted by the said receiver pursuant to the statute in such cases made and provided and concurred in by the Director of Insurance." (R. 46.) The Court decreed and ordered:

(a) That the report and recommendation of the receiver respecting the reinsurance agreement be approved and confirmed (R. 46).

• • • • •

(d) That the receiver mail to all insureds named in Peoria Life Insurance Company policies in force as of November 15, 1933, a printed copy of the agreement when executed (R. 46).

(e) That all agents' contracts be disaffirmed as of November 15, 1933, the date of the entry of the order of liquidation and receivership (R. 46).

(f) That the receiver file a further report within ninety days (R. 46).

(g) That the receiver ascertain by appraisement the fair cash market value of the assets of the insolvent Peoria Life Insurance Company (R. 47).

(h) That dissenting policyholders file their claims with the receiver as of November 15, 1933, and that every policyholder who does not dissent be bound as having assigned all his claims against the Peoria Life Insurance Company to the Alliance in consideration of the Alliance's assuming insurance protection for said assenters (R. 47).

(i) and (j) That all creditors, whether policyholders or not, within ninety days, file written proofs of their respective claims or demands with the receiver (R. 47).

(k) That the Alliance file a claim for the amount of all claims assigned to it (R. 47).

(l) That the receiver give public notice to all persons having or asserting any claim or demand against the Peoria Life Insurance Company, or having any equitable interest in the assets of the receivership estate (R. 47).

• • • • •

(n) That the receiver make a report of claims filed, with his recommendations for allowance, and providing for objections and contest by the claimants and the receiver and adjudication by the court (R. 48).

(o) That objections to the appraisement may be filed and heard (R. 48).

• • • • •

(r) That the court reserves general jurisdiction to exercise all powers and perform all such functions as it may lawfully do under the Illinois statute entitled "An Act in Relation to Delinquent Insurance Companies, Associations, and Societies" approved June 26, 1925, and to determine all claims and demands filed with the receiver and the manner of distribution of all assets or property now or hereafter coming into the possession of the receiver (R. 48).

The foregoing liquidating orders were subsequently complied with by the receiver and by the Life and Casualty Company, thereafter named Alliance Life Insurance Company. Many persons, firms, and corporations filed claims with the receiver, in accordance with the order. Among those claimants were the petitioners, who filed their claims within the period of ninety days, as required by the de-

cree (R. 42, pp. 166-169). Petitioners' claims in respect of commissions on premiums paid to the Peoria Life Insurance Company prior to November 15, 1933, were recommended for allowance by the receiver, but their claims in respect of commissions on premiums paid to the receiver and by the receiver to the Alliance and on premiums paid to the Alliance were recommended for disallowance. Although the receiver believed he had no jurisdiction of premium payments made after the liquidation order of November 15, 1933, he did receive some such monies which he held in a special fund for whatever benefit might accrue to such payers (R. 250). Those monies were never received by the Peoria Life Insurance Company nor were they commingled with the Peoria Life assets. When the agreement between the receiver and the Alliance was approved, the monies paid by a dissenter to the agreement were returned in full to him, but the monies paid by assenters to the agreement were paid by the receiver to the Alliance as premium payments for the new insurance provided by the Alliance (R. 214, 215, p. 1254).

The trial court, after extended hearings upon the original claims and upon subsequent amended claims filed by petitioners, confirmed the recommendations of the receiver that petitioners' claims be allowed for commissions on premiums paid to the Peoria Life before the liquidation order of November 15, 1933. The petitioners in due course received their pro rata shares as dividends on the allowed claims, as did all other creditors (R. 214, p. 1252). Their claims for commissions on premiums paid after the liquidation order were disallowed (R. 224, pp. 1274, 1275).

The petitioners appealed from the order of the Circuit Court disallowing their claims for commissions on premiums paid to the Alliance after November 15, 1933. They appealed directly to the Supreme Court of the State of Illinois, alleging the same constitutional question now

urged in this Court. When this matter came before the Supreme Court of Illinois on the 17th day of October, A. D. 1938, the court found and adjudged that the case was wrongfully appealed to the Supreme Court of Illinois and ordered that the case be transferred to the Appellate Court of the Second District of the State of Illinois (Appendix; 303 Ill. App. 430, 433). The case was heard by the Appellate Court, Second District of Illinois, and the decision of the trial court was affirmed.

The petitioners appealed from the Appellate Court to the Supreme Court of Illinois, assigning as error that the Appellate Court refused to consider constitutional errors previously urged on their attempted direct appeal to the Supreme Court. The judgment of the Appellate Court was affirmed, from which petitioners now seek a writ of certiorari from this Court.

ARGUMENT.

I.

PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION.

1. There is no substantial federal question presented by the present petition. The petitioners have had their day in court with proper notice and opportunity to be heard upon their claims. They were not proper or necessary parties to the statutory proceeding of the People of the State of Illinois against the Peoria Life Insurance Company, filed November 15, 1933. (*Ward* v. *Farwell*, 97 Ill. 593, 618.) They claim no right to be heard in that proceeding, in which the liquidation of the Peoria Life Insurance Company was ordered. Although they had no prior notice of the entry of the decree on August 22, 1934, they had ample notice of the requirements of that decree as to presenting proofs of claim. They did present their claims to the court, which entered the order of liquidation of November 15, 1933, and decree of August 22, 1934, approving the receiver's plan of liquidation. Their claims against an insolvent estate have been adjudicated by the court, which has a statutory jurisdiction to adjudicate such claims. (Ill. Rev. Stat. 1933, Ch. 73, par. 105 (11).) The merits of petitioners' claims have been reviewed by the Appellate Court and the Supreme Court of Illinois, including their contentions that questions of constitutionality were involved. (Decided adversely when the Illinois Supreme Court transferred the cause to the Illinois Appellate Court. Appendix I and *People* v. *Peoria Life Ins. Co.*, 303 Ill. App. 430, 433. That decision is now final as to claimants. *People* v. *Davies*, 354 Ill. 168.) In substance, petitioners are asking the Supreme Court of the United States to review the decision

of the Illinois Courts, interpreting and applying an Illinois statute, the constitutionality of which is not questioned.

We submit that this does not present a substantial federal question and that the petition should be denied in accordance with the doctrine laid down in *Kammerer* v. *Kroeger,* 299 U. S. 302; 81 L. ed. 253. In that case, petitioners had made a claim against the receiver of a building and loan association in process of liquidation. These claims were denied by the trial court and the judgment sustained by the Court of Appeals and then by the Supreme Court of Ohio. The Supreme Court of Ohio dismissed the appeals on the ground that "no debatable constitutional question was involved," a ruling similar to the action of the Illinois Supreme Court in originally refusing to take jurisdiction of a direct appeal in the present case. This court, in *Kammerer* v. *Kroeger, supra,* held:

> "We find no basis for the contention that in denying appellants' claim to be paid for counsel fees and expenses out of the assets in the hands of the liquidator, upon the ground that the court was without jurisdiction to make such an allowance, any right of the appellants under the federal constitution has been infringed. The question is one of state practice and remedy. The motions to dismiss the appeals are granted and the appeals are dismissed for the want of a substantial federal question."

2. When petitioners claim damages against the receiver because of anticipatory breach of their agency contracts by the failure of the Peoria Company, such claims are based upon the validity of the decree of liquidation entered November 15, 1933. They therefore admit that their contracts were legally terminated on November 15, 1933, and not by the decree of August 22, 1934, of which they now complain. Petitioners claim only that they had no notice of the hearing which resulted in the decree of August 22, 1934. That decree did not in any respect affect

any rights petitioners had, except only that it ordered the receiver to give public notice to all persons, firms, or corporations to file claims within ninety days from the date of the entry thereof. That notice was received by petitioners who thereupon complied with the decree of August 22, 1934, and filed their claims (R. 42, pp. 166-169). Petitioners had many hearings on the subject of their claims, and on March 11, 1938, more than three years after the decree of August 22, 1934, they, by written stipulation, agreed that the issues were presented by their amended claims and pleadings. Those claims are now presented in this proceeding. The Circuit Court of Peoria County gave petitioners a full hearing and adjudicated their rights. Petitioners had review thereof in both the Appellate and the Supreme Courts of the State of Illinois. They must now be estopped to complain that they had no notice. There is, therefore, no basis for the contention of the petitioners that they have been deprived of any rights or property without due process of law. Petitioners cannot now contend that the decree is invalid which they found of record when and pursuant to which they filed their proofs of claim. They took the decree as they found it, since the filing of their proofs of claim is equivalent to intervention. (*Bethke* v. *Grayburg Oil Co.*, 89 F. (2d) 536, 539).

II.

PETITIONERS' REJECTED CLAIMS HAVE NO MERIT.

There is no basis for petitioners' contention that the receiver of the Peoria Life, and subsequently the Alliance Life Insurance Company, received premiums on policies which petitioners sold. Petitioners were agents of the Peoria Life Insurance Company. There were not agents of the Alliance. They contend, however, that their agency contracts with the Peoria Company continued to exist in

spite of the liquidation order of November 15, 1933, and that the policies or contracts of insurance which they sold as agents for the Peoria Life Insurance Company continued to exist in spite of the liquidation order of November 15, 1933. The statute of the State of Illinois is a clear and concise answer to their contentions. Similar statutes have been recognized by this Court.

In the case of *Clark* v. *Williard*, 292 U. S. 112, 120; 78 L. ed. 1160, 1165, this Court said:

> "In our judgment the statutes of Iowa have made the official liquidator the successor to the corporation and not a mere receiver. * * * His title is not the consequence of a decree of a court whereby a corporation still in being has made a compulsory assignment of its assets with a view to liquidation. * * * His title is the consequence of a succession established by the corporation by the law of its creation." (*Relfe* v. *Rundle*, 103 U. S. 22; 26 L. ed. 337, and other cases there cited.)

Rights asserted by petitioners are dependent upon their agency contracts with the Peoria Life Insurance Co.

The parties must be conclusively presumed to have entered into those contracts in contemplation of the possibility of the insurance company's insolvency and its liquidation under the Insurance Liquidation Act of the State of Illinois. (*People* v. *Peoria Life Ins. Co.*, 376 Ill. 517, 521, 522; R. 332.) The Illinois Insurance Liquidation Act provides that when the Circuit Court shall order the liquidation of the business of any company, the title to all of the property, contracts, and rights of action of such company shall vest in the receiver as of the date of the liquidation order, and that the rights and liabilities of any such company and of all persons interested in its assets, shall be fixed as of the date of the entry of the order directing the liquidation of such company (*Supra*, p. 3).

Appointing a receiver to take possession of the assets of a corporation and distribute them is tantamount to dissolving the corporation. (*Blanchard Bro. & Lane* v. *Gay Co.*, 289 Ill. 413, 421.)

In contracts which require the continued existence of a particular person or thing, the destruction or death of that person or thing will terminate the agreement. (*Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610; 2 Restatement of Contracts, section 458.)

When the decree ordering liquidation was entered and the receiver appointed, title to all of the property of the Peoria Life Insurance Company passed to the receiver by virtue of the Illinois Insurance Liquidation Act (*People* v. *Peoria Life Ins. Co.*, 357 Ill. 486), and from that moment the Peoria Life Insurance Company had no further corporate power for any purpose for which it had been organized. The company became *civiliter mortuus*, its business was brought to an absolute end, and the policyholders became creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets. (*Carr* v. *Hamilton*, 129 U. S. 252; 32 L. ed. 669, 670.) To like effect, the agents and all other persons interested in its assets became creditors to an amount equal to the value, as of the liquidation date, of whatever contracts they had when the contracts ceased. The company could no more employ agents, issue policies of insurance, accept premiums, or pay claims. Every contract which had been made with it was disaffirmed, and every contracting party reduced to such claim as he might have against the receiver. The liquidation proceeding, once begun, could not be abandoned or changed to rehabilitation. (*People ex rel. Palmer* v. *Acme Plate Glass Ins. Co.*, 292 Ill. App. 275.)

The agreement between the receiver and the Alliance Life Insurance Company, which was approved by the de-

cree of August 22, 1934, did not in any way affect petitioners' rights. By that reinsurance agreement the Alliance agreed only to assume contracts of insurance with the former policyholders of the insolvent Peoria Life Insurance company subject to restrictions, limitations and conditions therein stated for and in consideration of the payment to the Alliance by the receiver of the pro rata distributive shares of those former policyholders of the Peoria Company who agreed to be bound by the provisions of the reinsurance agreement. The effect of the agreement was that, with the assets in the hands of the receiver, holders of policies issued by the insolvent Peoria Company acquired new insurance protection. The new protection came from the Alliance. (*Hobbs* v. *Occidental Life Ins. Co.*, 87 F. (2d) 380, 384.) The gist of the decree was to liquidate the property through the live and going insurance company by providing new insurance therewith. (*International Co.* v. *Occidental Life Ins. Co.*, 98 F. (2d) 138, 143-144, cert. denied 305 U. S. 639, 83 L. ed. 412.) There was no liquidation order in the case of *General American Life Ins. Co.* v. *Roach*, 179 Okla. 301, 65 Pac. (2d) 458, relied upon by petitioners.

To assure such policyholder-creditors of the maximum benefits, the agreement provided, by means of an accounting arrangement called the Peoria Life Fund, that profits whether from recovery of asset value or from the usual incidents of the life insurance business such as mortality savings, should inure for a specified period of years to the benefit of those who agreed to the provisions of the agreement and thereby assigned to the Alliance their rights to distributive pro rata shares of the Peoria Company assets. All former policyholders who did not agree could file their claims for their shares with the receiver.

The agreement, while specifically limited to the rights of former policyholders of the Peoria Life Company, also

expressly stated that the Alliance did not agree thereby to enter into any agreements with former agents, supervisors, managers, etc., of the Peoria Company. Petitioners therefore were expressly excluded from the agreement. They now seek to recover commissions on premiums paid to the Alliance by those persons who, through the medium of the agreement between the receiver and the Alliance, have acquired new insurance protection.

Petitioners have no right and never had any right to any such commissions any more than they would have any rights to any commission if each policyholder-creditor had taken his pro rata share in cash and bought insurance with it from the Alliance or any other company without petitioners' aid, because they are not now and never were agents of the Alliance; they had nothing to do with the arrangements for the new protection obtained from the Alliance; the only premiums received by the Alliance were for new insurance (the Alliance could not receive premiums for policies issued by the Peoria Company, since that company had no policies, no assets, and no life after November 15, 1933); and petitioners' agency contracts with the Peoria Company provided for commissions only in premiums paid to the Peoria Company in cash (R. 7). (No premiums could be paid to the Peoria Company after November 15, 1933.)

There is no basis for petitioners' contention that there was no liquidation because there was no sale for money of all the Peoria company assets. "In determining fairness the court may, in cases like the instant one, accept appraisal values instead of resorting to liquidation through sales, etc." (*Daniel* v. *Layton*, 75 F. (2d) 135, 137.) There is nothing in law or equity which precludes a creditor from taking his pro rata share in kind rather than in cash following a forced sale. Such a forced sale would depress the recoverable value of the assets, thereby increasing the loss

already sustained. It became the duty of the receiver and the Director of Insurance to utilize the assets for the best interests of the creditors of the insolvent Peoria Company. The Supreme Court of Illinois has clearly stated the equity of the position in the opinion (376 Ill. 523, 524, R. 334) now attacked by petitioners:

> "In view of the difficulty of realizing the utmost possible from those assets by a sale thereof, the difficulty or impossibility of policyholders, who had grown older, to secure other insurance, and for many other practical reasons, it was the judgment of the circuit court, that those assets could best be applied to a reinsurance contract. Those policyholders who wished to have their portions of the assets so applied concurred in the reinsurance agreement, and it was their assets and their future payments which were applied to that purpose. Policyholders not wishing to concur in the reinsurance plan were not required to do so, but were paid in cash their *pro rata* share of their respective equities in their respective policies. No agent contributed in any way to this reinsurance contract and there was no lien or claim of any agent which could impair the receiver's duty to purchase for the policyholders as much insurance as such policyholder's share of assets would buy for him."

The proceedings at all stages have been prosecuted under the statute of Illinois directing the liquidation of delinquent insurance companies. The rights of petitioners were fixed by that statute pursuant to the liquidation decree of November 15, 1933, not by the decree of August 22, 1934, here complained of. Each Illinois court in passing on their claims has so held.

The petitioners have been accorded due process of law at every stage when their rights were being determined, and their rights have at all times been fully preserved.

Conclusion.

The judgment of the Supreme Court of Illinois attacked by the petition presents no substantial federal question and no conflict of decisions or question of public importance. Therefore, it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS. } ss.

AT A TERM OF THE SUPREME COURT, Begun and held at Springfield on Tuesday, the Fourth day of October in the year of our Lord One Thousand Nine Hundred and Thirty-Eight, within and for the State of Illinois,

Present:

Elwyn R. Shaw, Chief Justice,
Justice Clyde E. Stone,
Justice Norman L. Jones,
Justice Francis S. Wilson,
Justice Warren H. Orr,
Justice Paul Farthing,
Justice Walter T. Gunn,
Otto Kerner, Attorney General,
Warren C. Murray, Marshal.

Attest:

ADAM F. BLOCH,
Clerk.

BE IT REMEMBERED, that, to-wit: on the 17th day of October, A. D. 1938, the same being one of the days of the said term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following, to-wit:

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Appellants,

Nos. 24667-24765 cons.

vs.

CHARLES V. O'HERN, AS RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION, AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Appellees.

APPEAL, CIRCUIT COURT PEORIA COUNTY.

And now on this day the Court having diligently examined and inspected the record and proceedings aforesaid as well as the brief and argument filed herein and oral argument by counsel and now being fully advised in the premises, is of the opinion, find and adjudge that this case was wrongfully appealed to this Court.

Therefore it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court of the Second District of the State of Illinois, and the

Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

And it is further ordered by the Court that the said Appellees recover of and from the said Appellants their costs by them in this behalf expended and that they have execution therefor.

I, EDWARD F. CULLINANE, Clerk *pro tempore* of the Supreme Court of the State of Illinois and Keeper of the records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the Seal of the said Supreme Court, in Springfield, in said State, this 18th day of July, A. D. 1941.

(Signed) EDWARD F. CULLINANE,
Clerk Pro Tempore.

(SEAL)

Office - Supreme Court, U. S.
FILED
NOV 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL., ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION; AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FRANK T. MILLER,
HARRY E. BROWN,
JOHN M. NIEHAUS, JR.,
DONALD G. BESTE,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 700

PEOPLE OF THE STATE OF ILLINOIS, EX REL., ERNEST PALMER, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,

vs.

PEORIA LIFE INSURANCE COMPANY, A CORPORATION.

IN THE MATTER OF THE CLAIMS OF: MARGARET HARWICK, ASSIGNEE OF HUGH E. VAN DE WALKER; FIDELITY & DEPOSIT COMPANY OF MARYLAND, ASSIGNEE OF GEORGE C. BERRA; T. A. CURNOW; THOMAS E. ROGERS; EDWIN B. SEIDEL; C. H. DELONG; AND W. H. LOGAN,

Petitioners,

vs.

CHARLES V. O'HERN, AS RECEIVER, AND TIMOTHY W. SWAIN, AS SUCCESSOR RECEIVER, OF PEORIA LIFE INSURANCE COMPANY, A CORPORATION; AND ALLIANCE LIFE INSURANCE COMPANY, A CORPORATION,

Respondents.

ERRORS IN RESPONDENTS' STATEMENT OF FACTS.

On page 4 of respondents' brief in detailing the claims filed by petitioners all reference is omitted to petitioners' claim against the receiver for the present cash value of their interest in renewal commissions based upon a refusal

of the receiver to pay, amounting to an anticipatory breach of the agents' contracts. This same omission is apparent throughout respondents' brief. As pointed out in petitioners' petition for writ of certiorari, pages 23ff, this claim based upon an anticipatory breach has been wholly disregarded by every court which has passed on this case. It is, therefore, especially interesting to note that respondents virtually admit the validity of this claim on page 14 of their brief, where it is said:

> "To like effect, the agents and all other persons interested in its assets became creditors to an amount equal to the value, as of the liquidation date, of whatever contracts they had when the contract ceased."

In considering this point, it is to be borne in mind that the agents had fully performed their part of the agreement and petitioners claims are for compensation for services wholly rendered prior to November 15, 1933.

Also, on page 4 of respondents' brief, in the Summary of Facts, it is stated that after petitioners endeavored to take a direct appeal from the Circuit Court to the Supreme Court of Illinois: "The Supreme Court of Illinois ordered the case transferred to the Appellate Court *on the ground that no constitutional question was involved.*" This statement does not agree with the order of the Supreme Court of Illinois, reference to which appears as an appendix to respondents' brief, although said order is not included in the record. The order in question merely recites that the case was wrongfully appealed, without giving any reason.

Again, on page 8, of respondents' brief it is said that in their attempt to take a direct appeal petitioners allege the same constitutional question now urged in this court. Petitioners claimed that the decree of August 22, 1934, properly interpreted did not take away their rights, but if the decree of August 22, 1934, was held to have taken away their rights, then a constitutional question was involved.

The Supreme Court of Illinois, when first presented with the question, took petitioners' view and remanded to the Appellate Court, but the Appellate Court and the Supreme Court later did hold that the decree of August 22, 1934, took away petitioners' rights, and, therefore, there is a constitutional question. However, the record on the first presentation of this case to the Supreme Court of Illinois is not part of the record in this case. The appendix to respondents' brief quoting the order of the Supreme Court of Illinois, entered October 17, 1938, is immaterial, does not support respondents' statement, and is entirely outside the record in the case now before this court.

Also, we remind the court that the Chief Justice of the Supreme Court of Illinois in his dissenting opinion gives it as his belief that petitioners have been deprived of their constitutional rights. (See petitioners' Petition for Writ of Certiorari, p. 9.)

In their Statement of Facts respondents persist in viewing the Peoria Life proceedings as a pure liquidation. The statute under which this proceeding was held (Illinois Insurance Liquidation Act of June 26, 1925, as amended by Act of May 20, 1929, Illinois Revised Statutes 1933, c. 73, sec. 495 ff) specifically provides that it is within the scope of the proceedings prescribed by said statute for a receiver to take possession of the property of an insurance company and conduct its business, and for the Court to grant such other relief as the nature of the case and the interests of policyholders, creditors, members, stockholders or the public may require. It is apparent that it is within the scope of the Illinois statute for a company whose capital is impaired to be reorganized, reinsured or otherwise rehabilitated. It has been so held (*People, ex rel. Lowe* v. *Old Colony Life Insurance Company,* 270 Ill. App. 403).

Petitioners' Petition for Leave to Appeal, pp. 19-22, shows clearly that whatever may have been the phraseology

of the original order entered November 15, 1933, the Peoria Life was never liquidated but was rehabilitated through a Reinsurance Agreement. Within eight days after the entry of the original order, that is, on November 23, 1933, a modifying order was entered reciting the intention of the receiver to solicit reinsurance proposals and not to proceed with the liquidation. This was what was actually done. In addition the trial judge in his written opinion denying petitioners' claims as against the Alliance Life stated in part:

> "In the summer of 1934, instead of liquidating the Company by sale of all assets and distribution to creditors, a decree was entered looking toward the receiving of bids for the taking over of the insurance business of those policyholders who would continue on therewith."

At various points in respondents' brief, mention is made of the "new insurance" or "new protection" provided by the Alliance Life subsequent to entering into the Reinsurance Agreement. (See Respondents' Brief, pp. 8, 15 and 16.)

As shown in our petition for certiorari, there was no new insurance, the Alliance merely issuing a certificate of assumption, under which it assumed the obligation of the Peoria Life under the same policies, which were continued to be held by the policyholders. The protection was not as great as that formerly provided by the Peoria Life since the only reserve behind the policies was the assets of the Peoria Life Fund, the Alliance contributing no new money and taking no financial risk. Furthermore, the policies were burdened with a fifty per cent lien. Also, the policyholders who continued with the Alliance were required to take no affirmative action to assent thereto and continued to pay the same premiums, which included a loading charge originally added in, to cover petitioners' renewal commis-

sions. These commissions are now being paid to agents of the Alliance who did nothing to earn them.

Respondents urge that petitioners have had their day in court. On page 6 of respondents' brief it is recited that the court in its decree of August 22, 1934, found that due notice of the hearing, at which said decree was entered, had been given to "* * * parties in interest *of record*". This is a recognition by the court that interested parties were entitled to notice, but the notice was limited to those who for some reason had previously participated in the receivership proceedings. Petitioners who had a very substantial interest therein had had no occasion to be made parties of record and received no notice, as the trial judge found.

Petitioners make no objection to the fact that the Peoria Life business was reinsured and taken over by the Alliance, but they do object to the fact that in this process their rights and interests in the Peoria Life business instead of being protected were destroyed.

At page 10 of their brief, respondents state: "The petitioners have had their day in court with proper notice and opportunity to be heard upon their claims." The argument is made that while petitioners had no notice their claims were subsequently considered upon the merits. The same contention is made in different language on page 12 of respondents' brief.

But the point is that the Illinois courts all took the view that petitioners' rights were foreclosed by virtue of the decree of August 22, 1934, pursuant to which the Reinsurance Agreement was entered into, and petitioners, therefore, have had no hearing upon the merits and have been deprived of their constitutional rights, since they received no notice of and were not present at the hearing on August 22, 1934, at which their rights were destroyed. The trial court specifically found that petitioners had no notice of

said hearing. The receiver's only objection to petitioners' original claims was that petitioners' rights were destroyed by the decree of November 15, 1933. In its answer to petitioners' amended claims the Alliance Life made the objection that petitioners' rights were destroyed as of November 15, 1933, by the decree of August 22, 1934, and that in any event the Alliance had no liability by reason of the terms of the Reinsurance Agreement approved by said decree of August 22, 1934. These decrees are the substance of respondents' case although no consideration is given to the fact that petitioners had fully performed their part of their contracts prior to the date the decree of November 15, 1933, was entered and are not even treated on an equality with other creditors, or to the fact that they had no notice of the hearing on August 22, 1934.

It is stated at pages 10-11 of respondents' brief, that petitioners are asking the Supreme Court of the United States to review the decision of Illinois courts in interpreting and applying an Illinois statute, the constitutionality of which is not questioned. Petitioners do not question the constitutionality of the Insurance Liquidation Act under which the Peoria Life proceedings were had, but, as heretofore pointed out, and as has been held by the Illinois courts, that act is not strictly a liquidation act but is so broad in its scope as to permit the reorganization, reinsurance or other rehabilitation of an insurance company whose capital has been found to be impaired. This case, therefore, is not limited to the interpretation of said statute but goes to the much broader question of whether petitioners have in the reinsurance proceedings affecting the Peoria Life been deprived of their rights contrary to Article XIV of the Amendments to the Constitution of the United States.

On page 11 of respondents' brief it is stated that petitioners, by reason of their claim against the receiver based

on an anticipatory breach of their contracts, admit that said contracts were legally terminated on November 15, 1933. Petitioners make no such admission except in the sense that by said decree their contracts were legally terminated as to the right of the two agents who were still active to continue soliciting insurance business. As to the right of the five agents who had retired under agreements that they would continue to receive their renewals, and as to the right of the two active agents to continue to receive their renewals, petitioners deny that said decree terminated either their right to such renewals or their right to receive payment of the cash value thereof as of the date of said decree.

Lastly, it is suggested on page 12 of respondents' brief that petitioners must take the decrees of the Circuit Court as they found them, since by reason of filing claims they are in the position of interveners.

The principle of law that an intervener must take a case as he finds it does not apply. The law has long been settled in Illinois that there can be no intervention without first filing a petition for leave to intervene and securing permission of the court (*Schumacher* v. *Klitzing*, 353 Ill. 530, 533). No such step was taken here, and its omission was not objected to by petitioners.

Further, no attempt was made to comply with Section 25 of the Civil Practice Act (Ill. Revised Statutes, Ch. 110, Sec. 149), as would have been required if plaintiff were, in fact, interveners. The court would not have permitted intervention after the plaintiffs were informed of the construction given the decree of August 22, 1934, and plaintiffs could not have intervened before the decree was entered because they had no notice.

ARGUMENT.

I.

Petitioners' Petition Raises a Substantial Federal Question.

Respondents' arguments on this point rest, as petitioners believe, upon erroneous statements of fact, which are commented upon in the preceding section of this reply brief. Petitioners, therefore, shall not answer this point at length, but respectfully refer the court to their petition for a writ of certiorari and to brief in support thereof, with particular reference to pp. 15-19 of said brief.

However, with reference to the case of *Kammerer* v. *Kroeger*, 299 U. S. 302; 81 L. ed. 253, petitioners desire to point out that no facts are stated in the *per curiam* opinion of the court in that case, which parallel the facts shown here. The constitution and statutes of the State of Ohio are not set forth in that opinion. Neither was there any lack of notice in that case; whereas, in the instant case the constitutional question involved is based upon lack of notice and opportunity to be heard.

II.

Petitioners' Claims Are Meritorious.

It must be stated at the outset that petitioners' claims have not yet been considered on the merits, since the sole question which has thus far been presented to any court is the validity of the decrees of the Circuit Court herein, which were based upon (1) the receiver's defense that petitioners were concluded by the decree of receivership entered November 15, 1933 (although petitioners are not named therein), and (2) the contention of the Alliance Life

that petitioners' rights have been destroyed by the decree of August 22, 1934, which provided that petitioners' contracts were disaffirmed as of November 15, 1933. In other words, the opinions of all the courts which have passed upon petitioners' claims merely advert to decrees of the Circuit Court of Peoria County, Illinois; the original decree of liquidation, in which petitioners were not named, and the decree of August 22, 1934, approving the reinsurance agreement, of which petitioners had no notice and at the consideration of which they were not present and had no opportunity to be heard.

Petitioners, therefore, maintain that they have been deprived of their rights without due process of law, contrary to Article XIV of the Amendments to the Constitution of the United States.

The statement is made on page 13 of the respondents' brief that the rights asserted by petitioners are dependent upon their agency contracts with the Peoria Life, and that the petitioners must be presumed to have entered into those contracts in contemplation of the possibility of the insolvency and liquidation of the Peoria Life. The fact that five out of the seven agents here involved had terminated their contracts voluntarily prior to the receivership and were being paid their commissions for services fully performed as of the date of receivership is overlooked. Also, the arguments in respondents' brief on this point appear to be based upon the misapprehension that the agents' contracts were wholly executory since the proposition is cited that the destruction of a particular person or thing terminates the agreement. This may be a valid proposition of law as applied to contracts executory on each side, but it has no application to contracts such as those in the instant case, which have been fully performed on petitioners' side.

The case of *Martin Emerich Outfitting Co.* v. *Siegel Cooper & Co.*, 237 Ill. 610, has already been distinguished in petitioners' petition for writ of certiorari, pp. 33-4.

It is admitted on page 14 of respondents' brief that the agents, like policyholders, upon the entry of the decree for a receiver became creditors in an amount equal to the value as of the liquidation date of whatever contracts they had when the contracts ceased. Petitioners have no quarrel with this proposition but insist that they have not been granted those rights. Petitioners are in the position of a creditor, for example, who might have sold something to the Peoria Life and fully performed his half of the agreement and was awaiting payment when the receivership decree was entered. Such a creditor would be entitled to payment of the full amount or to payment of the present value of his claim, if the contract was one calling for payment at intervals of time subsequent to the date the bill for receiver was filed. But, while such creditors of the Peoria Life have had their claims allowed, petitioners have been granted no allowance of their claims for renewal commission extending for a period of years beyond the date of receivership, although the present value of those commissions may be easily computed as a matter of common actuarial practice.

The assertion in the respondents' brief that the liquidation proceeding once begun could not be abandoned or changed to rehabilitation is a statement contrary to the fact of what could be done under our statutes and what was done in the instant case; and, even, if it should be the view of this court that an actual liquidation took place, nevertheless, as hereinbefore stated, petitioners have not been granted their equal rights as creditors.

The statement is made, also, in respondents' brief under this point that the reinsurance agreement did not in any way affect petitioners' rights. Nevertheless, paragraph 37 of that agreement purported to deprive petitioners of all rights which they had to renewal commissions; and it sanctioned an arrangement whereby the Alliance Life received the entire business of the Peoria Life as good pay-

ing insurance business while sloughing off all the burdens incident thereto, such as payment of renewal commissions to these petitioners, even though such commissions are included in the premium payments made by the Peoria Life policyholders, and have since as a matter of record been diverted to persons other than petitioners, all to the unjust enrichment of the Alliance Life and its agents.

The statement is made on page 15 of respondents' brief that there was no liquidation in the case of *General American Life Ins. Co.* v. *Roach*, 179 Okla. 301, 65 Pac. (2d) 458, which is relied upon by petitioners.

Reference to the opinion in the Roach case, as reported in the unofficial reports, 65 Pac. (2d) 458, 459, shows the following statement by the court:

> "In 1933 Missouri State Life Insurance Company was overcome by financial difficulties, and was taken over by the Insurance Commissioner of the State of Missouri in compliance with the laws of that State."

The laws of Missouri provided that the State Insurance Commissioner, instead of a receiver, should act in all cases where an insurance company was insolvent or its capital was impaired. No distinction can be drawn on this ground between the *Roach* case and the case at bar, and, just as in the *Roach* case, following the taking over of the insurance company and the finding of impairment of capital, there was here a reinsurance agreement whereby the business of the insurance company was continued without interruption. And in the Roach case, as heretofore pointed out in our petition for writ of certiorari, the claims of the agents of the old company were honored in full.

Statement is made on page 15 of respondents' brief regarding the method whereby the reinsurance agreement called for an assignment to the Alliance Life by Peoria Life policyholders of their interest in the Peoria Life. It need only be said that this particular arrangement is not provided for by statute and was entered into by the parties

concerned purely as a matter of choice and, as petitioners believe, with a view, in part at least, to defeating petitioners' claims and presenting the appearance of a genuine liquidation proceeding.

The statement is also made in respondents' brief on page 17 that the proceedings affecting the Peoria Life have been prosecuted under the statute of Illinois directing the liquidation of delinquent insurance companies, but, as heretofore pointed out, that statute contains broad provisions giving the receiver considerable leeway in handling the affairs of a delinquent company, and, also, it has been held by the courts of Illinois that said statute permits a rehabilitation or a reorganization under a reinsurance agreement. (*People ex rel., Lowe* v. *Old Colony Life Insurance Company,* 270 Ill. App. 403.)

Respondents also argue, under the second point of their brief, that nothing hinges upon the fact that there was no sale of all the Peoria Life assets. Petitioners take exception to this view, since while there was no such sale and distribution of the proceeds to creditors, respondents are endeavoring to treat the whole proceeding as though these things had taken place; that is, the Alliance Life has appropriated to itself the larger portion of the Peoria Life Insurance business, including thousands of policies written by petitioners, is continuing them in force with considerable restrictions without making any financial commitments itself, and yet is denying payment to petitioners for their interest in said policies. Whatever the process may have been or the form adopted, it is perfectly clear that the result is grossly inequitable to petitioners and that this is a case where equity should look through the form to the substance and prevent the unlawful enrichment of the Alliance Life at petitioners' expense.

Conclusion.

Petitioners, therefore, respectfully request that their petition for writ of certiorari to the Supreme Court of Illinois should be granted on the ground that they have been deprived of their rights without due process of law, contrary to Article XIV of the Amendment to the Constitution of the United States.

Respectfully submitted,

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